

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

SEP 13 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0089-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
PHILLIP DAVID MORRIS,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000533

Honorable John F. Kelliher Jr., Judge

REVIEW GRANTED; RELIEF DENIED

Zohlmann Law Offices of Tombstone  
By Robert J. Zohlmann

Cortez, FL  
Attorneys for Petitioner

K E L L Y, Judge.

¶1 Petitioner Phillip Morris seeks review of the trial court's order summarily dismissing his untimely notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Morris has not met his burden of establishing such abuse here.

¶2 Morris pled guilty to second-degree burglary and, pursuant to his plea agreement, was sentenced on June 13, 2011, to a fifteen-year prison term. On October 18, Morris filed a notice of post-conviction relief requesting that counsel be appointed and stating that he had not “agree[d] to a 15 year sentence” and did not “know that there wasn’t a significant change in the law.” On the notice form, Morris checked a box stating that his “failure to file a timely notice of post-conviction relief . . . was without fault on [his] part,” but provided no explanation or additional information.

¶3 The trial court appointed counsel, who filed a petition for post-conviction relief raising claims of ineffective assistance of trial counsel and prosecutorial misconduct based on the plea negotiations, asserting that the state improperly had withdrawn several more favorable plea offers at the behest of the victim and that trial counsel had been ineffective for failing to move to have the offers reinstated. Counsel did not, however, address that Morris’s notice of post-conviction relief had not been timely filed pursuant to Rule 32.4(a), Ariz. R. Crim. P., or acknowledge Morris’s claim in his notice that his failure to file a timely notice was without fault on his part. *See* Ariz. R. Crim. P. 32.1(f); 32.2(b).

¶4 The state responded to Morris’s notice of post-conviction relief, arguing Morris’s notice had not been timely filed and requesting that the trial court strike the petition. Without awaiting Morris’s reply, the court dismissed Morris’s notice as untimely and dismissed his petition for lack of jurisdiction. Morris subsequently filed a motion to vacate the dismissal order and a response to the state’s “motion to dismiss.” He asserted that, only days after his sentencing, he had mailed to the court a notice of

post-conviction relief and had filed the second notice dated October 18 after a “jailhouse paralegal” advised him to do so because he had not received a response from the court concerning his first notice. He further asserted that he did not timely receive the state’s response to his petition and, in any event, the court had violated his due process rights by dismissing his notice and petition without giving him the required time to reply to the state’s response and motion to strike. The court denied Morris’s motion to vacate its dismissal order, again dismissing Morris’s notice of post-conviction relief and striking his petition.

¶5 On review, Morris again argues the trial court violated his due process rights by dismissing his notice and striking his petition without giving him the opportunity to reply to the state’s response to his notice.<sup>1</sup> “The essential requirements of procedural due process are reasonable notice and an opportunity to be heard.” *Willie G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 231, ¶ 18, 119 P.3d 1034, 1038 (App. 2005). We find no due process violation in these circumstances. There is no dispute that Morris’s notice of post-conviction relief was filed untimely pursuant to Rule 32.4(a). An untimely notice of post-conviction relief may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), and (h). Ariz. R. Crim. P. 32.2(b). Although Morris’s notice stated that the untimely filing was without fault on his part pursuant to Rule 32.1(f), it did not include

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<sup>1</sup>Morris asserts that, pursuant to Rule 35.1, Ariz. R. Crim. P., he was entitled to ten days to respond to the state’s motion because it was, in essence, a motion to dismiss because it did not address the merits of his claims. Although Rule 32.6(b), Ariz. R. Crim. P., provides that a defendant has fifteen days to reply to the state’s response in a Rule 32 proceeding, we need not determine which rule would apply here.

“meritorious reasons . . . substantiating the claim and indicating why the claim was not stated . . . in a timely manner” as required by Rule 32.2(b).

¶6 Accordingly, pursuant to Rule 32.2(b), the trial court was required to summarily dismiss the notice. And, given that the time limits of Rule 32.4 are jurisdictional, *see* A.R.S. § 13-4234(G), and therefore cannot be waived by the state, *see State v. Silva*, 222 Ariz. 457, ¶ 9, 216 P.3d 1203, 1205 (App. 2009), the court had no authority to do otherwise.<sup>2</sup> Thus, that the court dismissed Morris’s notice only after receiving the state’s response to his petition, but before receiving Morris’s reply, does not violate any due process right Morris had to respond to the state’s argument.<sup>3</sup> And Morris cannot reasonably claim he lacked notice that his notice of post-conviction relief was untimely because it was apparent from the record. Moreover, Morris indisputably had an opportunity to be heard on this issue. Any claim that his notice’s lack of timeliness should be excused had to have been made and properly developed in his notice or in an amended notice filed by counsel after his appointment. As Morris acknowledges, the claim was not adequately developed in his notice and, additionally, counsel did not seek

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<sup>2</sup>To the extent Morris suggests, relying on *State v. Harden*, 228 Ariz. 131, 263 P.3d 680 (App. 2011), that the trial court had discretion whether to dismiss the notice, that case does not support that proposition and, as we have explained, dismissal was mandatory in these circumstances.

<sup>3</sup>Even if we agreed Morris had some due process right in these circumstances to reply to the state’s response before the trial court’s ruling, any error plainly was harmless. *Cf. State v. Pena*, 209 Ariz. 503, ¶ 15, 104 P.3d 873, 877 (App. 2005) (“Error is harmless only if . . . , absent the error, the court would have reached the same result.”). In his motion to vacate the dismissal of his notice, Morris presented his claim that the untimely filing of his notice should be excused, which the court considered and correctly rejected. As we have explained, that claim was required to have been made in Morris’s notice. Ariz. R. Crim. P. 32.2(b). Any later attempt to raise it came too late.

leave to file an amended notice developing that claim or acknowledge the late filing in the petition for post-conviction relief filed on Morris's behalf.<sup>4</sup>

¶7 For the reasons stated, although review is granted, relief is denied.

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

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<sup>4</sup>We observe that Morris, as a pleading defendant, had the right to the effective assistance of counsel in this, his first, Rule 32 proceeding. *See Osterkamp v. Browning*, 226 Ariz. 485, ¶¶ 18-19, 250 P.3d 551, 556 (App. 2011). We express no opinion as to the merits of a claim that counsel in this proceeding has been ineffective.